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No. 66.

Office Supreme Court, U. S.
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OCT 26 1906
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IN THE

Supreme Court of the United States

No. 19,823

REUBEN L. MARTIN,

Plaintiff in Error

VS.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error

REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR

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of Counsel.

The Vindicator Press, Youngstown, O.

In the Supreme Court of the United States

REUBEN L. MARTIN, *Plaintiff in Error,* vs. THE PITTSBURG & LAKE ERIE RAILROAD COMPANY, *Defendant in Error.*	REPLY BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

ARGUMENT.

In reply to the argument of defendant in error, filed herein, the following contentious are submitted on behalf of the plaintiff in error:

FIRST. AS TO THE ARGUMENT THAT THE ACT OF APRIL 4, 1868, SHOULD NOT BE DISTURBED AT THIS TIME ON ACCOUNT OF ITS AGE.

It is contended by defendant in error in various parts of its brief that because the statute, the constitutionality of which is herein attacked, has been permited to stand for 35 years that i is now too late to successfully attack it on the grounds relied on in the case at bar.

To this contention the plaintiff in error replies:

(a) Because the railroad companies of the State of Pennsylvania have enjoyed for 35 years, under an unconstitutional provision of the statute, exemption from liability for acts of negligence for which they should have paid, is no reason why the unlawful privilege should be made perpetual on account of age or the fact that question of its constitutionality was never before properly brought before this court for its determination.

(b) The railroad companies have not changed their position nor have property rights been affected, in a manner of which said companies could be heard to complain, by reason of

the long standing of the statute. If they have been relieved from paying vast sums of money by reason of the continued operation of an unconstitutional statute that might be a subject for congratulation but would hardly be a tenable position of defense. No statute can be too old to be repealed or amended by legislative enactment; and no one, provided no constitutional rights are infringed, can be heard to complain by reason of such change. If privileges having their inception in statutory provisions can be changed by the legislature without giving ground of complaint to those enjoying said privileges, surely no objection can be made by them because they are deprived of such privileges when a court finds that they rested on an unconstitutional basis and unlawfully deprived others of rights guaranteed to them by the Federal constitution. It is with poor grace that they seek protection behind its age.

(c) If no citizen of Pennsylvania has seen fit to challenge the constitutionality of the Act, under the Federal constitution, *that* is no reason why a citizen of another state cannot so make the challenge when the act is invoked to defeat his rights and deprive him of that which otherwise would belong to him; and this, no matter how old the statute may be, nor how many others have been theretofore deprived of their constitutional rights thereby.

(d) The plaintiff in the case at bar was not a citizen of the State of Pennsylvania, but of the State of Ohio, and no cause of action had accrued to him prior to the one herein claimed, and this statute had never before been interposed as a defense to a claim by him made. The doctrine of laches cannot be invoked against him.

(e) The constitutionality of the statute has never been passed upon by the court of last resort of Pennsylvania on the grounds relied on herein. Only the constitution of the State of Pennsylvania was considered by the court in deciding the case of *Kerby* vs. *Railroad Company*, 76 Pa. St. 506, relied on by defendant in error to sustain the constitutionality of this statute.

It can hardly be held as contended by defendant herein, that the holding of the Supreme Court of Pennsylvania in that case would preclude this court from determining the question as to whether or not the act under consideration is in violation

of the Federal constitution because the part of the state constitution therein considered was in some respects similar to that of the Federal constitution herein under consideration. If it would be, then the court of last resort of a state could foreclose the consideration of a Federal constitutional question by this court by holding that the act in question did not contravene the provisions of its own constitution of similar purport to that of the Federal constitution.

It was held by the Supreme Court of the United States in the case of *Miller* vs. *Railroad Company*, 168 U. S. 131, that the only constitutional question raised by the plaintiff in that case was that arising out of the State, and not the Federal, Constitutional provisions; and for that reason this court declined to consider the case and dismissed it.

No constitutional question was raised in the case of *Railroad Company* vs. *Price*, either in the State or Federal Court. There is nothing in the opinion of the Supreme Court of the United States, 113 U. S. 218, which can by any means be construed to hold anything else than that there was no Federal question raised in the case by reason of Revised Statutes of the United States Sec. 4000 and the Act of March 3, 1865, as it came into that court from the Supreme Court of Pnensylvania. The claim made by counsel representing the plaintiff in error in that case was that there was a Federal question involved in that the decedent, Price, was a passenger, under and by virtue of, Sec. 4000 of the Revised Statutes of the United States. The court held with reference to this:

> "We do not think these provisions either aid or govern the construction of the proviso in the Pennsylvania statute."

Inasmuch as that was the only ground by which the Supreme Court of the United States was asked to take jurisdiction of said case it was necessarily dismissed.

SECOND. AS TO THE CONTENTION THAT UNDER THE LAW OF THE STATE OF PENNSYLVANIA A POSTAL CLERK WAS NOT A PASSENGER PRIOR TO THE ENACTMENT OF THE STATUTE AND, THEREFORE, WAS NOT DISCRIMINATED AGAINST BY REASON OF ITS ENFORCEMENT.

It is contended by the defendant in error that a railway postal clerk would have no rights as a passenger in the State of Pennsylvania if the Act of April 4, 1868, had never existed; that by the common law of that State such postal clerk had no rights; and that the different relationshp in which he stands to railroad companies carrying him in the State of Pennsylvania from those carrying him in other states is simply a result of a difference in the common law of the State of Pennsylvania from that as it existed in the other states of the Union. To support this contention no authorities are cited.

In addition to what has been said by plaintiff in error on this subject on pages 9 to 20 of its opening brief herein the following is submitted:

A reference to the case of Railroad Company vs. Price, 96 Pa. St. 256, relied upon by defendant in error to establish its defense that a railway mail clerk is not a passenger within the terms of the statute, discloses that it is the case in which the Supreme Court of Pennsylvania has given the contsruction to the act, the constitutionality of which is in this case challenged, and that its holding therein is that *under the terms of said statute* a railway postal clerk is not a passenger, and does not have the rights of such, notwithstanding the fact that prior to the enactment of said statute he had the right to recover for the negligence of the employes of the carrier so transporting him. The language of said court on this subject is as follows:

> "This class" (referring to the new class created by the statute from which the right to recover was taken by the terms of said statute) "prior to the act of 1868, were entitled, under the decision in *Cattawissa Railroad Company* vs. *Armstrong, supra,* to from negligence of the employe."

In a recent case decided by Judge Archbald, United States District Judge of the Middle District of Pennsylvania, the fact herein contended for is established.

> *"By reason of the local Pennsylvania act of April 4, 1868,* (P. L. 58), *as construed in Railroad v. Price,* 96 Pa. 256, although contrary to the great weight of authority elsewhere, a railway mail clerk is not a passenger, and according to the provisions of the statute, in case of personal injury while engaged in the performance of his duties on or about the road, works, depots or premises of a railroad, or any train or car thereon, can only recover of such company the same as one of its employes."

Yarrington vs. *Delaware & Hudson Co.*, 143 Fed. Rep. 565.

A reference to the case just referred to discloses the fact that the judge writing said opinion was not only loath to follow the construction placed upon said statute by the court of last resort of said State, but was greatly impresesd with the harshness of its operative effect. In that case, it should be observed, no constitutional question was apparently raised, none was, at least, referred to in the opinion. It should also be observed that the postal clerk who was the plaintiff in said case did not have an interstate run, but his duties were confined to the State of Pennsylvania solely. The language used by the court in passing upon the case points strongly to the fact that had the plaintiff's duties taken him between two or more states a different conclusion on this proposition would have resulted. The language referred to is in part as follows, (p. 569):

> "Not only, as it seems to me, does it contain several doubtful assumptions involving more than one non sequitur, but it stands absolutely alone, being opposed to the overwhelming weight of authority to the contrary. *As the consequence of this, moreover, we have the anomalous result that whenever a railway mail clerk is carried into or through Pennsylvania, on an interstate run, his status changes as he crosses the state line, being accorded the rights of a passenger for one part of his journey, and not the rest of it, unless, perchance, the interstate character of it should be held to interfere."*

It is submitted with confidence, however, that, in addition to the foregoing the cases of *Railroad Company* vs. *Henderson*, 51 Pa. St. 315, and of *Lockhart* vs. *Lichtenthaler*, 46 Pa. St. 151, are determinative of what the rights of the railway postal clerk were prior to the enactment of said statute, and that, in absence of said statute, such railway postal clerk would have the same rights as a passenger to recover for the negilgent acts of the carrier or its employes.

THIRD. AS TO THE CONTENTION THAT THE STATUTE DOES NOT REGULATE INTERSTATE COMMERCE.

Many of the cases cited by the defendant in error in support of the contention that the classification made in the Pennsylvania act is not unconstitutional are cases in which the party raising the question is a corporation and the court, sustaining the constitutionality of the statute, bases its reason on the ground that the legislature—which has power in advance to determine what rights, privileges and duties it will give to, and impose upon, a corporation which it has created—has, under the generally reserved right to alter, amend, and repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation.

The case of *Gladson* vs. *Minn.* 166 U. S. 427, cited by defendant in error, to sustain its contention that an act of a state legislature compelling interstate mail trains to stop at county seats is not in contravention of the interstate commerce clause, must be examined in the light of the facts stated in the opinion that it affected only trains running within the State, and that the statute then under consideration expressly provided that "this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad."

When interstate mail trains are affected by such statute it has been held to be void as coming within the operation of the clause.

> "A statute of the state which unnecessarily interferes with the speedy and unniterrupted carriage of the mails of the United States, cannot be considered as a police regulation."
>
> *Railroad Co.* vs. *Illinois*, 163. U. S. 142.-154.

FOURTH. AS TO THE CONTENTION THAT BECAUSE IT HAS BEEN HELD THAT A STATE MAY ENLARGE THE LIABILITY OF A MASTER FOR THE NEGLIGENCE OF A SERVANT IT SHOULD FOLLOW THAT THE CONVERSE OF THE PROPOSITION IS TRUE.

It is contended by defendant in error that because it has been held that a state may enlarge the liability of a master for the negligence of a servant it should follow that the converse of the proposition is true and that a state may diminish by statute the employer's liability. If the conclusion of the courts to the effect that state statutes imposing on railroad companies civil liability to their employes for the negligence of fellow servants be based, as it is in *Tullis* vs. *Railroad Company*, 175 U. S. 348, and cases therein cited, on the ground "that the hazardous character of the business of operating a railway would seem to call for special legislation in respect to railroad corporations *having for its object the protection of their employes as well as the safety of the public*," it could not be contended that a statute, which by its terms exempted the railroad companies from liability not only to its employes but also to certain classes, not their employes, and which were being conveyed by them for hire, would for the same reason be a valid provision. The holding must be based on the theory that the railroad company has the power and right to govern its employes, in the performance of their duties, by the promulgation and enforcement of proper rules, and if such rules be not observed by such employes that the master can discharge the same, and that the imposition of additional liability tends to the exercise of greater care on the part of the railroad companies in this respect.

Railroad Co. vs. *Curran*, 19 O. S. 365.

Jacobson vs. *R. R. Co.*, 20 Minn. 125.

If the *imposition* of such liability be valid as relating to employes, for the reason stated, those reasons cannot be relied on to support *exemption* from liability to non-employes. It being established that the exigencies of the character of the business justified the imposition of additional liability on the railroad company, it must follow that the same conditions must make a statute creating the exemption from liability to the classes referred to, especially obnoxious and invalid. *The same reason cannot support the two kinds of statutes.*

FIFTH. AS TO THE CONTENTION THAT PLAINTIFF ASSUMED THE DEPRIVATION RIGHT CREATED BY THE STATUTE.

But it is claimed by defendant in error that the plaintiff was obliged to know that while in the state of Pennsylvania he had none of the rights of a passenger, whatever his rights may have been in other states. The contention of defendant in error is based on the assumption, that because the statute in a state into which the interstate business of plaintiff in error required him to go, which deprives him of rights which are enjoyed elsewhere, that by going into said state he accepts and agrees to all the burdens placed upon him by said statute, no matter how contrary to the constitution they may be.

The contention carries with it its own condemnation. If it were tenable, then by remaining in a state the individual aggrieved and oppressed by the operation of the statute would be estopped from challenging its constitutionality. His only recourse would be to remove to some other state. If any presumption is to obtain as to the knowledge of this plaintiff, a non-resident and non-citizen of the state of Pennsylvania, it is that although there existed a statute in Pennsylvania which deprived him of his right to recover for the negligence of the employes of a railway company on the train of which he was traveling, he had the right, if the occasion ever arose, to test the validity of that statute by the limitations which are prescribed by the Federal Constitution. Whatever may be said as to the right to take away the rights of an employe in favor of his employer, by statutory enactment, cannot be in any manner controlling as to the right to change the status of a non-employe or a passenger or a passenger to that of an employe, as we have heretofore seen. The contention of defendant in error on this subject again is dependant on the assumption that a railway postal clerk did not have the rights of a passenger prior to the enactment of the statute. His assumption failing the contention based thereon falls with it.

This is not a case of a servant contracting for service with a master whose business requires his employes to go into two or more states; in such case the servant *agrees* by his contract

of service with the master to be subject to the laws of the states in which said service is to be performed. In the case at bar the contract of the plaintiff was with the Federal Government and under a statute of the United States (Sec. 4000-4005) which provided for his transportation on railroads over which the duties of his employment would take him, and that a compensation would be paid by his employer to said railroad company for said transportation; and thereby he was *in fact* a passenger, and in all other jurisdictions, including the Federal, was in *law*, a passenger. Because a state statute changes his status to that of an employe, *not of the Federal Government*, but of the railroad company, could hardly be contended, much less held, to make him, by implication, or in fact, *agree* to such change, as between himself and the railroad company. The waiver of the right could not be effected even by an express agreement. It surely cannot be done by a legislative enactment.

> "While a valid statute regulating contracts is, by its own force, read into, and made a part of such contracts, it is otherwise as to invalid statutes."
>
> *Palmer* vs. *Tingle*, 55 O. S. 423.
>
> *City of Cleveland* vs. *Construction Co.*, 67 O. S. 197.

But it has been held, and properly, that the right of a railway postal clerk to recover for injuries sustained by reason of the negligence of the carrier or its servants cannot be waived.

Seyholt vs. Railroad Co. 95 N. Y. 562-571-572-574.

SIXTH. AS TO THE CONTENTION THAT THE FOURTEENTH AMENDMENT CANNOT BE HELD TO RENDER THE STATUTE INOPERATIVE FOR THE REASON THAT THE STATUTE WAS IN EXISTENCE AT THE TIME THE FOURTEENTH AMENDMENT BECAME OPERATIVE.

It is suggested by defendant in error on page 19 of its brief, that because the statute herein under consideration was passed in 1868, prior to the passage of the Fourteenth Amendment, that it cannot be affected or controlled by the provisions

of said amendment. This contention is disposed of by a case decided by this court wherein it is held, with reference to the Fifteenth Amendment, as follows:

> "The adoption of the Fifteenth Amendment rendered inoperative a provision of the then existing constitution of a state whereby the right of sufferage was limited to the white race."
>
> *Neal* vs. *Delaware*, 103 U. S. 370.

Respectfully submitted,

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Attorney for Plaintiff in Error.

ROBERT B. MURRAY,
WILLIAM S. ANDERSON,
Of Counsel.

IN THE

Supreme Court of the United States

REUBEN L. MARTIN,

Plaintiff in Error,

VS.

THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

Defendant in Error.

ARGUMENT ON BEHALF OF THE DEFENDANT IN ERROR.

Statement.

The circumstances out of which this litigation arose and the legal questions involved are so fully stated in the stipulation of Counsel (p. 26 to 28 of the Record) and so fairly set forth in the argument made on behalf of the Plaintiff in Error (pp. 1 to 4) that they require no extended restatement.

The Defendant Railroad Company had contracted with the United States Government to carry the mail in a mail car

provided for that purpose and by virtue of its contract became obligated to "carry the person in charge of the same;" this by virtue of Sec. 4000 Revised Statutes of the United States. Plaintiff had been assigned by the Government to take charge of the mail between Cleveland and Pittsburg. His duties were to work on the mail car and to distribute the mail in bags at intermediate stations and also at Cleveland and Pittsburg. On one of his trips from Pittsburg towards Cleveland and while within the State of Pennsylvania, the train was derailed at a switch negligently left open by a brakeman, and the Plaintiff was to some extent injured. The Common Pleas and Circuit Courts and the Supreme Court of Ohio, under the authority of The Pittsburg & Lake Erie Railroad Company against Bishop, 7 Circuit Decisions p. 73, Railroad against Price, 96 Pa. State p. 264, and Price against the Railroad Company, 113 U. S. p. 218, held that the rights and liabilities of the respective parties were to be governed and determined by the law of the State of Pennsylvania; and that under the statutory law of that state of April 4, 1868, Plaintiff was "lawfully engaged or employed upon a car of the Railroad Company, of which Company he was not an employee," *that he was not a passenger*, and that his rights were such only as they would have been if he had been an employe of the Railroad Company. It further appearing to the Court from the decisions of the State of Pennsylvania pleaded in the answer and introduced in evidence, (see p. 30 of the Record) that if he had been employed by the Railroad Company and injured under like circumstances by the negligence of the brakeman, he could not have recovered, judgment was rendered for the Defendant Company.

The Statute of the State of Pennsylvania which to-

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THE PITTSBURG & LAKE ERIE RAILROAD COMPANY,

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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

James P. Wilson,
ARREL, WILSON & HARRINGTON,
Attorneys for Defendant in Error.

The Toledo Legal News Printers

gether with adjudicated cases, rules this case, reads as follows:

> "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots and premises of a Railroad Company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employee; provided that this section shall not apply to passengers."

Argument.

It will be conceded, therefore, that this case was properly decided in favor of the defendant Railroad Company, by the Common Pleas, the Circuit and the Supreme Court of the State of Ohio, unless the statute of Pennsylvania, quoted above, is invalid upon one or more of the grounds upon which it is alleged to infringe the Federal Constitution, its validity having been upheld in all of the Ohio Courts.

If we have fully comprehended the able argument of plaintiff's counsel, it seems to proceed upon the theory that under the law of Pennsylvania, as it existed prior to 1868 —the year of the enactment of the statute—a postal clerk, working for the government in a mail car, while the train was passing through the State of Pennsylvania, sustained the legal relation to the Railroad Company, of passenger and carrier; that prior to the statute, if he had been hurt under the circumstances existing in this case, he would have been entitled to recover damages for the injury inflicted; that the effect of the statute was to change the relation of passenger which he sustained to the Railraod Company and to limit his right to recover damages, to such right as he

would have had, if he had been an employee of the Company, and that such being the practical, operative effect of the statute, it was unconstitutional in that it,

FIRST. Attempts to regulate commerce among the several states.

SECOND. Interferes with the right of Congress to to establish post-roads.

THIRD. It deprives plaintiff of property, without due process of law.

FOURTH. Abridges his privileges and immunities as a citizen.

FIFTH. It denies to him as a postal clerk in the State of Pennsylvania, the equal protection of the laws.

While we do not consider it to be material in the consideration of these questions to determine what the technical legal relation was which Martin would have sustained to the Railroad Company, in the State of Pennsylvania and under its laws, if no such statute had been enacted, yet, as the whole stress and force of the argument of the plaintiff's counsel is based upon the assumption, that but for the statute, Martin would have had the rights of a passenger in Pennsylvania, it will not be amiss to consider briefly the ground of this contention.

A. Under the law of the State of Pennsylvania, the plaintiff did not sustain the relation of passenger to the defendant, either prior to or subsequent to the passage of the statute.

We had supposed this point had been settled for us beyond all controversy, by the Supreme Court of Pennsylvania, in the case of the Pennsylvania Railroad Company versus Price, reported in 96 Pennsylvania State Reports, page 256; wherein it is distinctly held that a postal clerk in the employ of the government while working in a mail car, running

through the State of Pennsylvania, *is not a passenger*, and the syllabus of the case is as follows:

> "The Act of April 4th, 1868, provides, 'That when any person shall sustain personal injury or loss of life while lawfully engaged or employed on, or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employee, the right of action in all such cases against the company shall be only such as would exist if such person were an employee, provided this section shall not apply to passengers.' *Held*, that a route or mail agent in the employ of the United States Post Office Department, while traveling on a railroad in the performance of his duties, *is not a passenger within the meaning of the act.*"

In that case, Price, a postal clerk, was injured in the State of Pennsylvania, by a collision between a mail train on which he was working and another train. In his action against the Railroad Company the statute was interposed as a defence. To avoid the effect of the statute, it was the contention of Price, that he was a passenger, entitled to all the rights of a passenger, and therefore was expressly excluded from the provisions of that act, by the last clause which reads as follows:

> "Provided this section shall not apply to passengers."

It will therefore be seen that the precise question presented to that Pennsylvania Court, was whether Price was or was not a passenger within the State of Pennsylvania. If he was, then the Act did not apply to him; if he was not, then being in the employ of a third person, and working upon the railroad train, the Act did apply. The court determined conclusively that he *was not a passenger* and furthermore, goes on to give the reasons *why* he was not a

passenger. Thus, on page 266 of the opinion, the court says:

> "It was urged that the deceased was a passenger, because, under the Act of Congress, Section 4,000, 'Every railway company carrying the mail shall carry on any train which shall run over its road, and without extra charge therefore, all mailable matter directed to be carried thereon, with the person in charge of the same.' "This Act makes it the duty of the Company to carry the mail Agent without extra charge, *but it no more makes him a passenger than it does the mail matter of which he has the care.* The Company have no control of him, as they have over passengers for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner. The mail-car like the baggage-car is in a known place of danger. From its position, it is peculiarly exposed to destruction in case of collision."

The court then goes on to distinguish the line of cases cited by counsel in their argument, from the case cited, particularly the Henderson case, so much relied upon. We are aware that the courts of other states and that the Federal Courts have reached a different conclusion, but with their conclusions, we are not at present concerned.

The Price case above cited went to the Supreme Court of the United States and the decision in that Court (113 U. S. p. 218) affirming the Supreme Court of Pennsylvania, throws much light upon this subject, the Court holding that the fact that the injured person was a postal clerk and that he was being carried, together with the mails, under a contract made with the Government, no more affected the question of whether he was a passenger than if he had been in charge of so much freight and employed by some third person.

See language of the Court on page 222.

> "The Statutes of the United States which authorize and direct this service did not therefore make the person so employed a passenger nor deprive him of that character in construing the Pennsylvania Statute, nor does it give the person so employed any right as against the Railroad Company, which would not belong to another person in a similar employment, by others than the United States."

It thus appears that while under the common law as announced in some states a postal clerk traveling in charge of the mails is regarded as a passenger, (see cases cited by Plaintiff's Counsel) yet that fact is entirely immaterial and has not in any degree influenced the judgment of the United States Supreme Court in enforcing the common law of the State of Pennsylvania.

In this connection it should be said that the Statute of Pennsylvania, April 4th, 1868, the constitutionality of which is attacked in this case, *in no manner bears upon or affects the entirely independent question of whether or not the Plaintiff was a passenger in the State of Pennsylvania.* The question whether a postal clerk was or was not a passenger turns upon widely different considerations entirely apart from the Statute, and it must be apparent from the cases cited, that the Plaintiff would have no rights as a passenger in the State of Pennsylvania, if the Statute under consideration had never existed; so that it is not a sound contention as urged by Counsel for Plaintiff, that the relation of passenger which he sustained in Ohio was taken away or abrogated by this Statute of Pennsylvania. The different relationship in which he stands to the Defendant Company in Pennsylvania is simply the result of a difference in the common law of the two states.

We think, therefore, that this court must conclude, that

the argument for plaintiff, based upon the assumption that the plaintiff was deprived of his rights as a passenger, by reason of this statute, is untenable, and so far as that argument is urged to illustrate the invalidity of this Pennsylvania statute, it is without weight.

If we were to assume, however, for the mere sake of the argument, what is not true in fact, that the statute deprived him of the legal remedies of a passenger and limited him to the rights of an employee of the Company, yet we can not assent, even under that assumption that any constitutional question can be raised.

The Constitutional Question.

B. This statute in no manner obstructs or interferes with or attempts to regulate commerce between the states, and is not in contravention of article 1st, section 8 of the Constitution of the United States.

It may be conceded that the carrying of the United States mails is a matter relating to inter-state commerce, and that the regulation of it rests with Congress. It is conceded that the Plaintiff was in charge of the mails at the time of his injury. These admitted facts in no manner affect the question. The Supreme Court of the United States has already said in the Price case, 113 U. S. p. 218-222:

> "The Statute of the United States did not give to persons so employed any right as against the Railroad Company which would not belong to any other person in a similar employment by others than the United States, *and therefore no question of Federal authority* is involved in a state judgment in an action brought to recover of a Railroad Company for injuries received while so employed, by its negligence." And in the opinion the Court says: "Nor does the fact that he is in the employment of the United States and that

> Defendant is bound by contract with the Government to carry him, affect the question."

We refer the Court to the case of The Lake Shore & Michigan Southern Railroad Company against the State of Ohio, 173 U. S. p 258, 7th part of the Syllabus.

> "Revised Statutes of the United States authorizing Railroad Companies to carry *Government supplies, mails*, etc., from one state to another, does not prevent the state from enacting such regulations, with respect at least to a Railraod Corporation of its own creation, as are not directly against inter-state commerce, and are not regulations thereof but only incidentally or remotely affect it, and are designed to promote the public convenience."

We have examined with some care the cases cited by Counsel for Plaintiff in Error upon this question, and we find them, without exception, to be examples of an attempt upon the part of a state either to impose a direct tax upon articles of commerce coming into the state, or in attempts to exclude or discriminate against the classes of persons brought into the state or to impose a tax upon the traffic in articles carried from another state, and thus to interfere with inter-state commerce. They all seem based upon the principle that a state cannot legislate in such a manner as to obstruct the free carriage of freight or passengers from state to state, or to enact laws which have for their tendency the regulation of such traffic. These authorities are all reviewed and clearly distinguished in the case of Railroad vs. Kentucky, 116 U. S. p. 700, Opinion of Justice Brown. The Plaintiff's Counsel have cited no cases, nor do I think an adjudicated case can be found, wherein there is the remotest indication that it was ever considered by the United States Supreme Court or by any other Federal or State Court, that a State Statute attempting to define the relative rights and the relative obligations of a Railroad Company

towards its employees and third persons was an attempt to regulate inter-state commerce. This question, however, has been considered recently by the United States Circuit Court of Appeals, sitting in Cincinnati. It was contended that the Ohio Statute of April 2d, 1890, especially that subdivision of it relating to co-employees of Railroad Companies, and making of certain employees superior servants, who at common law had been considered fellow servants, was an attempt to regulate commerce among the states, and for that reason unconstitutional.

Pierce against Van Dusen, 78 Fed. Rep. p. 693, part 2nd of the Syllabus reads as follows:

> "Said Statute is not applicable alone to Railroad Corporations of Ohio engaged in the domestic commerce of the state, but to all Railroad Corporations doing business in Ohio. It does not encroach upon Federal authority nor upon the jurisdiction and powers of the Federal Courts, and is binding upon those Courts." On page 698 the Court says: "The State may do many things affecting commerce with foreign states and among the several states until Congress covers the question by national legislation." (Here the Court cities many instances of such valid legislation.) Continuing on page 700, the Court says: "Undoubtedly the whole subject of the liability of interstate Railroad Companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the states. But as Congress has not dealt with the subject, it was competent for Ohio to declare that an employee of any Railroad Company doing business here, including those engaged in commerce among the states, shall be deemed in respect to his acts within this state the superior, not the fellow servant, of other employees placed under his control. * * * Of the validity of such legislation, we entertain no doubt."

As we have already seen, the Statute of Pennsylvania which we are considering, does not affect the question as

to whether or not the Plaintiff was a passenger. It merely provides that if the Plaintiff is lawfully engaged or employed to work upon the car of the Railroad Company, and he is not employed by that Company, that his rights shall be only such as are given to employees under similar circumstances. The Statute, in its most usual application, does not affect persons riding upon trains at all, but as will be seen later, has been applied by the Courts to affect the rights of that very numerous class of persons, who, not being employees of Railroad Companies, are yet employed by third persons to work around the roads, works, depots and cars of Railroad Companies. As we have seen, however, it has been construed to extend to postal clerks, who come directly under the letter of its provisions. Now, we suppose it to be perfectly clear that the legislature of a state may prescribe the duties which a Railroad Company within the limits of that state owes to its passengers, to its employees *and to third persons;* and if the State Statute is such that persons working upon trains coming into the state have fewer rights than they had while passing through other states, the local Statute governing their rights can in no manner be said to interfere with the commerce between states; it neither taxes, obstructs, hinders nor prevents a person from freely coming into the state. We suppose it to be entirely clear that a state legislature might enact a law providing that there should be *no liability* on the part of a Railroad Company to a person injured in that state while riding upon a gratuitous pass, waiving negligence. We know that the laws of the various states differ materially in this respect, yet not for that reason would any lawyer maintain that such Statute attempted to regulate inter-state traffic.

N. P. R. R. Co. vs. Adams, 192 U. S. 440.

In this case Adams was an inter-state passenger.

Boering vs. C. B. Ry. Co. 193 U. S. 442.
Duncan vs. Maine Ry. Co. 113 Federal 508.

We presume that a state might entirely cut off the right of a beneficiary to recover for wrongful death and such an act might by a parity of the reason indulged in by Plaintiff's Counsel, *deter mail clerks from coming into the state* lest, if they be killed, their heirs would have no right to compensation, yet no Court would hold that such an act attempted to regulate or interfere with inter-state commerce.

Sherlock vs. Alling, 93 U. S. 99.

This was a case brought by Charles Alling, Administrator, to recover against a steamboat company, for the unlawful killing of the decedent in Indiana. Defense was interposed that the decedent was an inter-state traveller; that the statute of Indiana imposed a liability on the carrier for wrongful death, which did not exist in Kentucky, or under the Federal Laws; that such a statute *therefore attempted to regulate inter-state commerce.* It will be observed that such is the identical contention made by plaintiff in this case. The syllabus of the case is as follows:

> "Until Congress makes some regulation touching the liabilities of parties for marine torts resulting in death of the persons injured, the Statute of Indiana, giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, applies, the tort being committed within the territorial limits of the State; and, as thus applied, it constitutes no encroachment upon the commercial power of Congress.
>
> "The action of Congress as to a regulation of commerce, or the liability for its infringement, is exclusive of state authority; but, until some action is taken by Congress, the legislation of a State not directed

against commerce or any of its regulations, but relating generally to the rights, duties and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may indirectly and remotely affect the operations of foreign or interstate commerce, or persons engaged in such commerce."

Court goes on to say, Justice Field, page 102:

"In conferring upon congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

And upon the preceding page 101, the court goes on carefully to distinguish between such laws as really affect and impede commerce, or those which only indirectly or in a remote or fanciful degree, can be said to have that tendency.

The Statute of Pennsylvania in no manner either prevents or restrains the rights of postal clarks to travel into the state on mail cars in the performance of their duties.

A case illustrative of our contention will be found in 169 U. S., p. 133, Railroad Company vs. Solon as follows:

"The rules prescribed for the construction of Railroad Companies and for their management *and operation*, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local laws. They are not in themselves regulations of inter-state commerce. Second:—A State Statute prohibiting contracts to exempt a Railroad Company from liability as a common carrier, is not in any just sense a regulation of commerce or void as to inter-state business."

And on page 137 the court says:

"A carrier exercising his calling within a particular state, although engaged in the business of inter-state commerce is answerable according to the law of the state for acts of non-feasance or of mis-feasance committed within its limits * * * * so long as congress has not legislated upon that particular subject,

they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

Directly in point we cite the following:

17 Am. Eng. Ency. of Law, 2d Ed., p. 75 and p. 95.

93 U. S. Supreme Court Reports, 99.

"A state may lawfully provide by statute for the examination of locomotive engineers and the licensing of them."

124 U. S., 465.

Require such engineers to be examined from time to time with respect to their ability to distinguish colors.

128 U. S., 96.

Prescribed regulations for the receipt and delivery of despatches by Telegraph Companies.

172 U. S., 650.

Forbid the running of freight trains on Sunday.

163 U. S., 299.

Require railroad companies to fix their rates annually for the transportation of passengers and freight; post copies of rates in their stations.

17 Wallace, 560.

Regulate the heating of passenger cars.

165 U. S., 628.

Forbid the consolidation of parallel or competing lines.

161 U. S., 677.

Require railroad passenger trains to stop at every station of 3,000 inhabitants.

173 U. S., p. 285, wherein the court says:

> "The power exists in each state by appropriate enactments not forbidden by its own or the Federal Constitution, to regulate the relative rights and duties of all persons and corporations within its jurisdiction so as to provide for the public convenience and the public good."

A State Statute imposing liability for death by wrongful act, does not violate the commerce clause.

Stephen Bird Ex. vs. Chas. Alling Admr.

93 U. S., 99.

Nor requiring *mail trains* to signal.

90 North Western, 358.

Nor compelling inter-state *mail trains* to stop at county seats.

143 Ill., 434.

166 U. S., 427.

We therefore submit with confidence that congress not having legislated on this particular subject until long subsequent to the trial of this cause, the Pennsylvania Statute under consideration in no manner violates the commercial clause of the Federal Constitution, or the clause relating to the establishment of post roads.

C. The act of April 4th, 1868, does not violate the Fourteenth Amendment of the Federal Constitution.

For thirty-five years this statute has ruled all cases brought against Railroad Companies by third persons whose work or employment brought them in contact with the Railroad Companies' employees and subjected them to the same risks. It has been construed, enforced or distinguished by the Supreme Court of Pennsylvania in very many adjudicated cases arising out of a wide range of circumstances. In its most frequent application, however, the statute has been invoked in cases brought by the employees of Manufacturing Companies or by persons who were obliged to work upon the cars or tracks or on the premsies of the Railroad Company, and whose work subjected them to precisely the same risks as the work of the railroad employees themselves. Among the adjudicated cases are the following:

Kirby vs. R. R. Co., 76 Pa. St., 506.
Mulhern vs. R. R. Co., 81 Pa. St., 193.
Rickard vs. R. R. Co., 89 Pa. St., 193.
R. R. Co. vs. Calvin, 118 Pa. St., 230.
Stone vs. R. R. Co., 132 Pa. St., 206; 104 Pa. St., 511.
Cummings vs. R. R. Co., 92 Pa. St., 82.
Fleming vs. R. R. Co., 134 Pa. St., 478.
Pa. Co. vs. Price, 96 Pa. St., 256
Spisak vs. R. R. Co., 152 Pa. St., 281.
Miller vs. R. R. Co., 154 Pa. St., 473.
Christman vs. R. R. Co., 141 Pa. St., 604.
R. R. Co. vs. Kirk, 90 Pa. St., 16.
Traction Co. vs. Orbann, 119 Pa. St., 37.

It is singular that in the oft repeated adjudications it

has not occurred to courts or lawyers that this statute contravened the fourteenth amendment to the Constitution of the United States:

> "Long aquiescence by a state in the enforcement of a statute and the repeated enforcement of it by the courts of that state, is a strong argument against the unconstitutionality of it when attempted to be raised."
>
> 8 Cyc. of Law and Prac., 737.
>
> 17 Ency. of Law 2d Ed., P. 77 and on P. 738 note:
>
> "An act of the legislature supported by a long line of adjudication and treated by the government as constitutional, will not be inquired into."
>
> 11 Calif., 175.

The constitutionality of this statute has been challenged in the case of Kirby vs. the R. R. Co., 76 Pa. St., 506, Railroad vs. Price, 96 Pa. St., 256 and Miller vs. R. R. Co., 154 Pa. St., 473. The latter case went to the Supreme Court of the United States and is reported in 168 U. S., 131. In the Kirby case its constitutionality was challenged upon the ground that it deprived the plaintiff of his property "without due process of law" in contravention of the Constitution of the State of Pennsylvania. It will be noticed in this connection that the clause of Pennsylvania's Constitution (quoted in the Kirby case and in the Miller case, reported in the United States Supreme Court) is in substance and effect the same, securing the same rights as the similar clause in the fourteenth amendment to the Federal Constitution. Such being the case, we suppose that a statute which is not violative of the Pennsylvania Constitution does not violate the ger-

mane provision of the fourteenth amendment to the Federal Constitution.

State vs. Ferris, 53 O. S., 314, 4th Part of Syl.

And particularly on page 341, opinion of court as follows.

> "As to the first section of the Fourteenth Amendment to the Constitution of the United States providing that no State shall deny to any person within its jurisdiction the equal protection of its laws, it is sufficient to say that the provisions of this section of the Federal Constitution are not broader than the second section of our bill of rights and that therefore a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the Constitution of the United States."

That part of the Pennsylvania Constitution under consideration, Article 1st, Sections 1 and 2, are as follows:

> "All men have certain inherent and indefeasible rights among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." And also, "that all courts shall be open and every man having an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without sale, denial or delay."

In what broader language, we ask, could a citizen's right to redress by due process of law be secured to him?

We suppose, therefore, that where a statute has formed the basis of oft repeated adjudication in a state and has twice been declared by the Supreme Court of that state to be in harmony with its constitution, whose provisions are as broad as the kindred provisions of the Federal Constitution, that the Federal Court will not declare that statute to be

violative of the provisions of the Federal Constitution in the absence of the most grave and weighty reasons imperatively moving the court to that conclusion.

We may say further, by way of preface, that while to an Ohio lawyer the wisdom or expediency of this statute may not, at first blush, be entirely apparent, yet with that question the judiciary has no valid concern.

Am. Eng. Ency. of Law, 2d Ed., pp. 1086 and 1087 and many cases cited therein.

Coming now to consider further the statute in its relation to the Fourteenth Amendment to the Federal Constitution:

First:—It does not deprive the plaintiff of property without due process of law, and does not abridge his privileges and immunities as a citizen, or deprive him of his right to make contracts.

It does not deprive the plaintiff of property without due process of law. The statute under consideration was passed some time prior to the adoption of the Fourteenth Amendment. If it be conceded that the validity of this statute is to be measured according to its operative effect, and its legality determined by the fourteenth amendment, which became operative subsequent to its passage which question we desire to submit, in passing without argument, yet it must be apparent that the plaintiff has been deprived of no property rights by the statute. The contract between the railroad company and the United States Government for the carriage of its mail, under Section 4000 of the Revised Statutes, was made long subsequent to 1868. The Federal Statute above quoted did not provide for any compensation to be paid by the government to the railroad company for the transporta-

tion of mail agents but in district words provided that there *should be no extra charge therefor*, and as this Supreme Court has said in the Price Case, 113 U. S., 222, that statute (4000) "did not make the person so employed a passenger, nor give him any rights because he was a mail agent."

Therefore the contract made by the Pittsburg and Lake Erie Railroad Company with the United States Government, under the provisions of which, long years afterwards, Martin began to distribute mail in one of the defendant's cars, neither at the time of the making of the original contract, nor at the time that Martin voluntarily sought employment, afforded him any redress for injuries suffered in Pennsylvania through the sole negligence of the company's inferior servants, as distinguished from the personal negligence of the railroad company. Martin had no *propety rights* at the time of his entering into the service, or at the time of his going into the State of Pennsylvania and was not deprived of any by this statute. *Neither was he deprived of the right to make a contract.* It may be conceded that a statute which in effect deprives an individual of the right to make a beneficial contract would deprive him of a property right. The authorities cited in the plaintiff's brief relate to statutes which expressly prohibit the making of a contract of labor, exceeding a certain limited number of hours per day and can afford us little aid upon this proposition. In all those cases there will be found an express statutory inhabition against the making of a contract. What is there in the statute of Pennsylvania which would have prevented the railroad company from waiving, if it so desired, the immunity granted to it by the statute of 1868 and of entering into a contract with Martin or any other of the thousands of other persons in dissimilar employments embraced within the purview of the statute, securing to them redress for injuries inflicted by the

subordinate servants of the railroad company? What is there that would have pevented Martin from entering into such a contract with the railroad company, as a condition precedent to his acceptance as Federal Postal Clerk? To cite the extract quoted in plaintiff's brief, "Parties may voluntarily contract to do what no legislature would have the right to compel them to do."

Railway vs. Smith, 173 U. S., 684-693.

As we have already stated, a postal clerk under the common law as it is proclaimed in the State of Pennsylvania, while at work on a railroad train never sustained the relation of a passenger to carrier. That is made clear to us by the Price case (96 Pa. St., 256). At the time, then, of entering into his contract of employment with the government and at the time of accepting his assignment to distribute mail in the State of Pennsylvania, the plaintiff was obligated to know that while in said state he had none of the rights of a passenger, whatever his rights may have been in other states, and this without any regard whatever to the statute we are considering. He was deprived of no property rights by virtue of this statute, nor is he denied any redress which he may have by due process of law, and no privilege or immunity to be considered a passenger, which he might claim to have is taken from him by this statute, but is the result of the declaration of what the common law of the State of Pennsylvania is, made long years ago by the Supreme Court of that State and the Supreme Court of the United States. The statute does not deny to the plaintiff a resident of Ohio, any rights of redress against the railroad company, which he would have if he were a resident of Pennsylvania. It simply legislates as to the rights of that large class of persons, in-

cluding the plaintiff, who voluntarily subject themselves to the same risks taken by the railroad employees, and limits their rights to an assumption of those risks. We think there can be no question that State Statutes can make the *peculiar circumstances which surround particular persons the ground for the imposition of certain liabilities* or the relief from certain liabilities. (See 7 Cyc. of Law and Procedure, title Constitutional Law, p. 1052 and cases cited.) A state may enlarge the liability of a master for the negligence of a servant without depriving him of property without due process of law (8 Cyc. p. 1098; 51 Conn., p. 461; 127 U. S., p. 205—Case of M. P. R. R. Co. vs. Mackey.

The syllabus of which is as follows:

> "The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the Fourteenth Amendment of the Constitution of the United States, in that it deprives the company of its property without due process of law and denies to it the equal protection of the laws.
>
> Legislation which is special in its character is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike, under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed.
>
> Corporations are persons within the meaning of the amendment." (Missouri Pacific vs. Mackey.)

And we doubt not the converse of this proposition is true that a court may diminish by statute the employer's liability by a valid enactment, and the fact that this statute may be considered to be in derogation of the common law in that it limits the rights of third persons who accept the risks of employees, to the rights of employees, in no manner deprives

them of any property right or of any process of law, since their service, under those circumstances is purely voluntary.

Second:—This statute does not deny to the plaintiff the equal protection of the laws.

This statute is clearly within the constitutional rights of the legislature of Pennsylvania or of any other state to enact laws which operate equally upon all of a certain class and which effect all persons pursuing the same business under the same conditions, alike.

10 Law Reports Annot. 135.
113 U. S., 27.
127 U. S. (See pp. 208 and 209.)
6 Am. Eng. Ency. of Law, 2d Ed., 970.
99 U. S., 718.
127 U. S., 678 (3d Part of the Syl.)
18 Law Rep. Annot. 729.
33 Law Rep. Annot. 589-593.
15 O. S., 573.
63 O. S., 202.

As was said by the court in the latter case, page 209:

> "If the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are or may be in like situation and circumstances, and the designation of the class is reasonable, not unjust, capricious or arbitrary, but based upon a real distinction, the law does operate uniformly."

We are aware that statutes of this nature must not be capricious, arbitrary or unreasonable, but the *very large discretion* accorded to the state legislatures and recognized by the Federal Courts may be evidenced by a quotation from a few of the adjudicated cases.

> "What such regulations shall be and to what particular trade, business or occupation they shall apply are questions for the state to determine, and their determination comes within the proper exercise of the police power of the state, and *unless the regulations are so utterly unreasonable and extravagant in their nature and purpose* that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interferred with or destroyed without due process of law, they do not extend beyond the power of the state to pass and they form no subject for Federal interference."

Gundling vs. Chicago, 177 U. S., p. 188, opinion of Justice Peckham.

> "Notwithstanding these cases the general rule holds good that whatever is contrary to public policy or inimical to the public interest is subject to the police power of the state and within legislative control, and in the exercise of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

Louisville Ry. Co. vs. Kentucky, 161 U. S., p. 701, Opinion of Justice Brown. See also 169 U. S., 381-388-392.

The reason of this statute

is fully elucidated in the Kirby and Price cases already referred to. In the Price case the court goes on to say, in substance, that before the passage of the statute, that large class of persons who work shoulder to shoulder with railroad men, upon the cars, tracks or premises of railroad companies, while they voluntarily subjected themselves to exactly the same risks from the negligence of the men they work with, if injured by an employee had a remedy against the company, while the company's employees, if injured by the negligence of such third persons, had no remedy against the company. The court continuing, says:

"Yet he (the employee) was in daily peril of injury from the negligence of persons of this third class. The legislature doubtless saw that it was unjust to give the non-employees such an advantage, and also that the company should be held liable in damages to such persons, who although lawfully upon the road were not under its contract (of employment). The Act of 1868 places persons in the third class upon the same plane as the employees of the company. There is strict justice in this. No good reason can be shown why the non-employees should have higher rights than the employees * * they enter upon the same dangerous employment with full knowledge of its perils and of their legal rights in case of injury. The rule which prevents a recovery by an employee for the negligence of the fellow servant is based upon the soundest principles of public policy. Railroad accidents are usually the result of the carelessness of employees. * * * So long as employees understand that they take their lives in their hands in entering upon their duties, and that their own safety, as well as the welfare of their families, depends upon their care and vigilence, the traveling public will have a reasonable assurance of safety. *The rule that no recovery can be had for the negligence of a fellow servant necessarily tends to increase vigilence on the part of the employees, and to that extent contributes to the public safety. Properly administered, it is wise and just.*"

In other words, the reason of the court proceeds upon this sound basis, that fellow servants knowing that they cannot recover damages for the negligence of each other, are hereby, each of them, induced to a higher degree of care, vigilance and attention on his own part, both to avoid inflicting injury upon his fellow servant and to avoid for himself the consequences of his fellow servants' negligence, and furthermore tends to increase his vigilence and prompt him in his duty to observe and report the negligence or reckless act of another tending to expose him to danger, and that his added degree of care results not only in greater safety to

the servant, but in an increased efficiency and assurance of safety to the traveling public; and proceeding further, *that precisely the same motive and incentive to safety exists in regard to those third persons who work alongside the servants of the railroad company*, perfom duties of a similar character and in the same places, and who are subjected to the identical risks, that they will be led to exercise a higher degree of care and vigilance for their own safetly and the safety of others, if their rights are limited to the rights of those who do the same work, and are subject to the same hazards, to-wit, the railroad employees. Further amplified in the Kerby case, 76 Pa. St., 509, the court says:

> "In what respect does this law trench upon this guarantee, or indeed on any other in the constitution? The person to be affected by it must be one lawfully engaged or employed on or about the road, etc. To be thus engaged he must be there by his own consent. He is, therefore, voluntarily there to perform some act or business connected with the road or its works. He knowingly assumes a relation regulated by the law, and thus places himself under the operation of the law, which governs the relation. He is not bound to assume the relation, and when he does, he acts with his eyes open. The law is not retrospective, and takes from him no remedy for an injury already sustained. The relation he assumes is one of danger, and the fact of danger authorizes the regulation by the state as the conservator of the lives, security and property of her citizens. It is a police regulation, which, having respect to the general good, forbids individuals from undertaking a dangerous employment, except at their own risk, to the same extent as if they were in the immediate employment of the railroad company. Leaving each one to assert his proper remedy against the person whose act or negligence does him the injury, the law says to him, that the legal principle of respondeat superior shall have no place in this particular relation; that as a matter of proper policy for the good of all, those who vol-

untarily enter into employments alongside of the servants of a railroad company, shall have just the same remedies for injuries happening in the employment that these have, and none other. In doing this, no fundamental right of the person thus voluntarily venturing, is cut off or struck down. The liability of the company for the acts or omissions of others, though they be servants, is only an offspring of law. The negligence which injuries is not theirs in fact, but is so only by imputation of law. The law which thus imputes it to the company, for reasons of policy, can remove the imputation from the master and let it remain with the servant, whose negligence causes the injury. It is unnecessary to refer to the long line of decisions, asserting the general power of legislation when unforbidden in the constitution. Finding no prohibtion against such a regulation of persons lawfully engaged or employed upon a railroad or its works, the section quoted of the Act of 1868 is not unconstitutional."

The Supreme Court of Pennsylvania adhered to its decision, in the case of Miller vs. The Railroad Company, 154 Pennsylvania State, 473. That case went to the Supreme Court of the United States where it was undertaken to attack the statute upon Federal constitutional grounds. The court, however, Justice Fuller rendering the opinion, declined to consider the question, for the reason that it did not appear to have been mooted in the State Court.

See Miller vs. Cornwall Railroad Co., 168 U. S., 131.

Now who shall say that this classification is arbitrary? We understand the rule to be, and it has been well illustrated in the numerous cases cited in brief of plaintiff's counsel, "That the classification must be based upon some difference which bears a just and proper relation to the attempted classification and the object sought to be accomplished." Apply-

ing this test, it will be entirely evident that the "difference" in the remedy is predicated upon the fact that this class of third persons who are engaged at work upon the roads, cars or premises of a railroad company, incur all, or nearly all of the risks incurred by railroad employees themselves. The statute differentiates this class from all other third persons not connected in their work with the railroad company. Proceeding further with this test, this difference "bears a just and proper relation to the classification," that is, the class of persons affected by this Act, bear an entirely different relation to the railroad company and their servants, from that sustained by persons in general, and under the power to legislate for the advantage of the public, the legislature prescribed certain limitations upon the legal rights of those who voluntarily assume such risks, from motives of public policy, which have already been fully discussed. We suppose that the Supreme Court of Pennsylvania was entirely competent to say whether this difference and this limitation upon the rights of those assuming these great hazards did, in fact, bear a just and reasonable relation to the purpose of the act, and it should perhaps be sufficient upon this subject to say, that after full consideration, being perhaps better advised as to the needs and circumstances of her people than we can hope to be, the court has, in fact, deemed it to be a fair and just classification having a real relation to the object sought and a plain tendency to accomplish it. It should be said in this connection that this statute in no manner tends to release the railroad company from the performance of any of those duties owing by a master to a servant, such as the hiring of competent employees and furnishing them with safe instruments of labor and a safe place to work. Any breach of duty of this kind gives rise to the same liability in favor of this class of persons as if they were employees and this by virtue

of the language of the statute. While the weight of the reasoning supporting this classification is perhaps more convincing when applied to the very many other cases coming within its provisions, it must be remembered that this particular case of a postal clerk presents an isolated and infrequent instance of the application of the statute. When we read the cases cited in this brief invoking the aid of this statute, which have been decided by the Supreme Court of Pennsylvania and which illustrate the most frequent application of the statute, the reason of it becomes clearly apparent. For example, there is reason in saying that the employee of a furnace company who goes on the cars of a railroad company to assist a train crew in unloading iron ore on a siding, doing precisely the same work required of railroad employees and subjected to the same risks, if he knows that his rights are those only of an employee of the railroad company, it will not only induce a degree of care and vigilance on his part that he be not injured by the negligence of the company's employees, but also a watchfulness to observe neglect on their part and to make complaint of it, all of which tends strongly to a greater safety. Or in the case of a private railroad crew of a manufacturing company running a private engine or private cars on railroad tracks, assisting in the receiving or delivering of cars from that railroad company, and performing work which cannot in any manner be distinguished from the work of the railroad company's employees, since they assume the same risks they should be subjected to the same rule, and if there be a high motive of public policy in the rule which denies redress to a servant for the negligence of his fellow servant, that public policy applies equally to the non-employee who voluntarily subjects himself to the same risks by doing

the same manner of work at the same place and under the same circumstances. The plaintiff in this case was not a passenger, and therefore, is not excluded from the operation of the Statute by the last provision of it. He was employed to work upon this car and is, therefore, included in the Statute; and if it were true that as to him individually the potency of the argument and reason of the Statute is not so clearly apparent, that in no manner affects the validity of the Statute, which in its wide application makes for the greater safety of all.

In the express messenger case, 176, U. S. p. 498, the Court arrives at the conclusion that it is *not against public policy* to permit an express messenger to expressly waive all right of compensation arising from the negligence of the railroad company's employees; thus, on page 514, quoted from the case of Bates against Old Colony Railroad Co. 147 Mass. 255 as follows:

> "If an express messenger holding a season ticket from a Railroad Company and desiring to ride for the conduct of the business in a baggage car, agrees to assume all risks of injury therefrom and to hold the Company harmless therefrom, the agreement is not invalid * * * and he cannot recover for injuries caused by the negligence of the Company's servants. * * * The fact that the Plaintiff was riding in the baggage car as an express messenger in charge of merchandise which was being transported there, shows more clearly that the contract by the express company and the Plaintiff was *not unreasonable* or against public policy. He was there as a servant *engaged with the servants of the Railroad Company in the service of transportation on the road.* His duties were substantially the same as those of the baggage master in the car, the latter relating to merchandise carried for passengers, the former merchandise carried for the express company. *His actual relation to the other servants of the railroad corporation engaged in the transportation were substantially*

> *the same as those of the baggage* master and would have been the same had he been paid by the corporation instead of by the express company; had the railroad done the express business the messenger would have been held by law to have assumed the risks of the negligence of the servants of the railroad."

This comparison of the relative duties of an express messenger and the railroad employees applies with equal potency to a postal clerk; his relative position and work is the same—and if the one may by express contract make himself in legal effect a fellow servant of the railroad employees, we suppose that a *statute based upon the same public policy* will not be open to the criticism of being arbitrary or capricious.

It is strenuously asserted, however, by plaintiff's counsel, that the Supreme Court of Pennsylvania has declared it to be against the public policy of the State, to permit a passenger by contract, to waive his right to compensation for injury, resulting from the carrier's negligence. This point we concede; but we still insist that it has no where been held in Pennsylvania, that a person whom the Supreme Court of that State has held *not to be a passenger*, may not contract for free carriage and be bound by his contract, without running counter to the public policy of the State. The position of Martin upon the train was analogous to that of the man, Voigt, the express messenger, whose case against The Baltimore & Ohio Railroad Company is reported in 176 U. S., 498. And to repeat our argument: If it was not against the public policy of the National government for Voigt to waive liability for negligence, the Supreme Court of the United States will not declare that a police regulation of the State of Pennsylvania, which accomplishes the same result, is against the public policy of the Nation. That it is not

contrary to public policy for a person riding upon a gratuitous pass, to waive negligence of the Company.

See N. Pacific Railroad Co. vs. Adams, 192 U. S., 440.

Boering vs. Chesepeake Beach R. R. Co., 193 U. S., 442.

Whatever may be the policy of other states, it has from the beginning been the settled public policy of Pennsylvania, to give the widest operatives effect to the defense of fellow-servant. In Pennsylvania, every employee of a common master is a fellow-servant, except heads of entire departments, over whom the master exercises no supervision or control, and there are no suprerior servants in Pennsylvania, save and except those heads of departments. The reason of these rules is sufficiently set forth in the opinion of the Supreme Court of Pennsylvania, in the Kirby case. While this rule of law and this state policy differs widely from the policy of Ohio, wherein every employee who exercises any authority is the superior of almost every other who exercises none, and is directly contrary to the policy of certain states, wherein the defense of fellow-servant has been abrogated by statute, it is sufficient for our purpose to know that the policy of giving to the fellow-servant rule the widest scope and effect has been considered by the courts of Pennsylvania to be calculated to induce the highest degree of care, vigilance and attention, upon the part of the operatives themselves for their own safety.

It will therefore be seen that the policy of including those workmen who voluntarily subject themselves to similar risks, in the same rule of liability as the Company's employee themselves, and of according to them similar rights, is entirely consistent with the settled policy of the State of

Pennsylvania in nearly a century of judicial history, to-wit, a recognition of the soundness of the policy which prevents a recovery by one servant for the personal negligence of another, even though that other be in control and direction over the injured servant.

Railroad vs. Bell, 112 Pa., St. Rep. 400.
Duffy vs. Oliver, 131 Pa., St. Rep. 203.

All this upon the theory that it induces a greater degree of care upon the part of each servant for his own protection and the protection of his fellow-workmen. Nor is the statute inconsistent with a public policy which prevents the carrier from contracting for immunity against injury to a paying passenger. That policy is entirely separate and apart from the policy which exonerates the master from liability for the personal negligence of a servant, whereby another, assuming similar risks, is injured.

Nor will it be deemed by this court necessary to refute, by argument, the proposition that because in any particular case the injured servant or the injured third person assuming the risks of a servant, does not in fact *know* or may never in fact have *seen* the particular servant who injures him, that this fact should make any difference with the practical application of the general principle which, in its general scope, rests not upon the particular opportunity for observing the negligent servant in any special instance, but which rests upon the *working out of a general system*, making for greater vigilance upon the part of every employee. If we seek for the reason of the rule it will be found deep in the common law. In the leading case on the subject, Priestly vs. Fowler, 3 M. & W., 1, Lord Abinger says:

"In fact, to allow this sort of action to prevail,

would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford."

The irresistable logic of this principle is amplifted in the opinion of Chief Justice Shaw, in Farwell vs. Boston & Worcester, 4 Metcalf, 49.

> "In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will, in their practical application, best promote the safety and security of all parties concerned."

It is no new thing in our common law to extend the principal of fellow-servant to include employees of third persons, who by their work are in contact with the servants of the master who is made defendant and to deny liability to the servants of such third persons upon the principle, *not that the assume the risk of the service*, but that the public policy of the State was best subserved by a rule denying liability in such cases and that its tendency was to induce a greater degree of vigilance upon the part of all operatives engaged in a common work.

Hawkins vs. Standard Sugar Refinery, 122 Mass., 400.

Johnson vs. Boston, 118 Mass., 114.

This Statute is criticised in that it applies only to railroad companies, and is not applicable to other car-

riers of freight and passengers, such as steamship companies, stage coaches and carriers of marine freight. It is perhaps a sufficient reply to this to quote the language of the Ohio Supreme Court in 63 O. S., p. 210.

> "Nor is it an objection to a Statute that it does not apply to all persons who might, by any possibility commit the act interdicted. It is for the legislature to determine how far to go in order to afford the desired protection to society. The exemption of some where it does not interfere with the rights of others, is not open to objection on constitutional grounds."

Again, when the railroad companies invoked this constitutional amendment to shield them from a Statute substantially wiping out the fellow servant rule in Kansas, upon the ground that it referred *only* to railroad companies and did *not* embrace other kinds of corporations, the Supreme Court said in 127 U. S. 205. Opinion of the Court by Justice Field:

> "The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objection therefore, can be made to the legislation on the ground of its making an unjust discrimination. * * * As said by the Court below, it is simply a question of legislative discretion whether the same liabilities shall be applied to carriers by canal and stage coaches, and to persons and corporations using steam in manufactories."

In this connection the very obvious suggestion occurs—that at all events the Plaintiff is not denied the equal protection of the laws *by the fact that this Statute does not include steam boats.*

There has been no hesitation by the Supreme Court of the United States in upholding legislation *increasing* the

liability of railroad companies, and the fact that such legislation abrogates the common law has never been considered to deny to railroad companies the equal protection of the law. The whole matter has been deemed to come under the head of police regulations committed wholly to the discretion of the state legislature. The extent to which the Court has gone in this direction can be seen by the full collation of authorities cited in:

8 Cyc. of Law and Proc. p. 1078 and 1079.
127 U. S. 205.
127 U. S. 210.
157 U. S. 209.

In each of the foregoing cases, Statutes making railroad companies liable to their employees for the negligence of fellow servants have been sustained upon the theory that the legislature was competent to determine whether or not such a policy induced care upon the part of the company. We suppose that by a parity of reasoning the legislature of the State of Pennsylvania being satisfied that the rule of law which has always been the law of Ohio, denying to servants redress for injuries inflicted by a fellow servant, made for and induced an increased vigilance on the part of the actual operatives of a railroad company, could lawfully include within such rule those who were actually employed about railroad work and upon railroad trains and subject to the same risks and hazards, even though they were not employed by the railroad company. We suppose the fourteenth amendment was not made exclusively for the protection of individuals, the word "persons" as used in that amendment has always been held to apply to corporations as well. And if the Statutes wiping out the common law and increasing the

liability of railroad corporations to the exclusion of others, did not contravene this fundamental law of the land, we suppose that laws upon the same subject, which, in the opinion of the highest State Courts fairly tend to accomplish the same result, to-wit, an increased public safety, cannot be attacked upon any such ground, even though the common law liability of such corporation be thereby diminished.

Cooley on Constitutional Limitations (5th Ed.) p. 716, note.

Counsel for Plaintiff indulge the speculation as to what would be the effect upon the constitutionality of this Statute if its terms were broad enough to exonerate the Railroad Company from liability to passengers or to the soldiers of the United States being transported for hire. While queries of this nature must appear to the Court in a great degree profitless, it would not be difficult for one possessed of a fertile fancy to construct in imagination a Statute which would be open to the vice of being an arbitrary and unjust encroachment upon the rights of individuals under the pretense of conserving a wise public policy. It is a sufficient reply to such conjecture, that the Statute by its very terms, embraces only that class which is "lawfully *engaged* or *employed* upon the premises or trains of a Railroad Company," that it expressly excludes passengers and that by no stretch of the imagination could it be so applied as to include commercial travellers, or in fact any other class of persons as to whom the railroad company owes the duty of the highest degree of care in their transportation.

We think it hardly necessary to notice the stricture which a certain popular law book author is said to have passed upon this statute, quoted in the plaintiff's brief. We have never heard that author accused of any deep knowl-

edge of Constitutional law and certainly the argument that he advances, to-wit, "that no State in the Union would have adopted this statute if it had been put to popular vote," can not be said to add weight to his remaining remarks upon the subject. The constitutionality of a statute can hardly be made to turn upon the popular approval of the multitude.

In conclusion we submit that this Statute violates neither the letter nor the spirit of our constitution and the judgments of the lower courts are without error.

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